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No. 79-1282

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICK PETROLEUM CORPORATION OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-33a) is reported at 608 F.2d 542. The opinion of the district court (Pet. App. 21a-24a) is reported at 457 F. Supp. 982.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1979. A petition for rehearing was

denied on January 18, 1980. The petition for a writ of certiorari was filed on February 19, 1980 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the indictment returned in this case sufficiently alleges offenses under the mail fraud statute, 18 U.S.C. 1341.

STATEMENT

By an indictment returned in the United States District Court for the Southern District of Texas, petitioners Patrick Petroleum Corporation of Michigan ("Patrick Petroleum"), Charles Douglas Robinson and Ronald Lamar Meeks were charged with 16 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 (Pet. App. 1a-20a).[1] Prior to trial petitioners moved to dismiss the indictment on the grounds, *inter alia*, that the mailings charged were insufficiently related to the alleged scheme to defraud to constitute offenses under the mail fraud statute. The district court granted the

[1] Also named in the indictment were Lauren Lee Smith, Jr. and William Thomas Kent. Smith pleaded guilty to one count of mail fraud upon agreement with the government that the other counts against him would be dismissed. Kent has been living in Belize, Central America, since April 1977. Proceedings to extradite him were initiated but have been held in abeyance pending resolution of the issue raised in this petition.

motion and dismissed the indictment (Pet. App. 21a-24a). The government appealed, and the court of appeals reversed (Pet. App. 25a-33a).

The scheme to defraud is alleged in paragraphs (1) through (9) of count one of the indictment (Pet. App. 1a-5a) and is incorporated by reference in each of the succeeding 16 counts. These paragraphs allege a scheme to defraud the Union Oil Company of California of its property; its right to have its business and affairs conducted honestly and free from deceit, trickery and conflict of interest; and its right to the loyal and honest services of its employee, Lauren Lee Smith, Jr. (*ibid.*). Specifically, the indictment alleges that the scheme to defraud involved (1) the bribery of Lauren Lee Smith, Jr., by William Thomas Kent to steal confidential oil exploration data from Smith's employer, Union Oil Company; (2) the use of that data by petitioner Patrick Petroleum and two of its employees—petitioners Robinson and Meeks—to procure oil, gas, and mineral leases in areas of Mississippi where the data indicated leases had been obtained and were being sought by Union Oil Company; and (3) attempts thereafter to sell an interest in such leases to Union Oil Company at a profit. The indictment further alleges that, as part of the scheme, Patrick Petroleum paid commissions and royalty interests to Kent on leases obtained through use of the Union Oil Company data and that such commissions and royalty interests, which Kent would share with Smith, were paid to Kent in the names of J.J. Paul and Harold Gray.

The mailings that form the basis of the 16 substantive counts in the indictment relate to that part of the scheme whereby petitioners used the confidential geophysical data they had acquired. Counts 1, 2, 3, 4, and 11 charge petitioners with knowingly causing statements for services and expenses of lease brokers to be delivered by mail to petitioners Patrick Petroleum and Meeks. The lease brokers were allegedly hired by Patrick Petroleum to secure leases in those areas in Mississippi where the stolen data indicated leases had been obtained or were being sought by Union Oil Company. As set forth in the indictment, the acquisition of these leases by Patrick Petroleum was part of petitioners' scheme to defraud Union Oil Company by impeding its leasing and development plans and depriving it of the rightful exclusive use and enjoyment of its own property (Pet. App. 4a).

Counts 5, 7, 9, and 12 charge petitioners with placing and willfully causing to be placed in the mails memoranda from Meeks to Robinson relating to the leasing activity in Mississippi; counts 5 and 12 additionally charge them with requesting the payment of commissions and assignment of royalty interests. Counts 6, 8, 10 and 13 charge petitioners with knowingly causing letters and memoranda relating to checks and assignments to Harold Gray and J. J. Paul for commissions and royalty interests in the Mississippi leases to be delivered by mail to petitioner Meeks. Counts 14, 15, and 16 charge petitioners with knowingly or willfully using the mails

to send letters and memoranda to Union Oil Company offering to sell to the latter the interests in the Mississippi leases owned by Patrick Petroleum. Finally, count 17 charges petitioners with conspiring to commit mail fraud, and it alleges overt acts in addition to those contained in counts 1 through 16, which are incorporated by reference.

In granting petitioners' motion to dismiss the indictment, the district court described the fraudulent scheme as encompassing only the alleged "tampering with the employer-employee relationship existing between Union Oil and Lauren Lee Smith and obtaining confidential geophysical data from Union Oil through its employee" (Pet. App. 23a). On the basis of this reading of the indictment, the court concluded that the alleged scheme was not "furthered or connected with" the mailings charged in the indictment to constitute offenses under the mail fraud statute (Pet. App. 24a).

The court of appeals reversed, holding that the district court "misunderstood the scope of the alleged fraudulent scheme" (Pet. App. 29a). The court found, *inter alia*, that, as characterized in the indictment, "the mailings were not made after fruition of the fraud, but were necessary to complete the scheme" (Pet. App. 31a).

ARGUMENT

1. We note initially that there is no need for this Court to grant the petition for a writ of certiorari at this time in order to review the question presented. The petition challenges the court of appeals' reversal

of the district court's pretrial dismissal of the indictment. That reversal puts petitioners in the same position they would have occupied had the district court denied their dismissal motions in the first instance. Such a ruling, not based on double jeopardy grounds, would not be subject to interlocutory appeal. *United States* v. *MacDonald*, 435 U.S. 850 (1978). Review by this Court of the present decision by the court of appeals would be similarly premature now. If petitioners are acquitted at trial, their claims will be moot; if they are convicted, and their convictions are affirmed, they will then be able to present all their claims to this Court in a petition for certiorari seeking review of the final judgment.

2. In essence, petitioners argue that the mailings charged in the indictment are too unrelated to the alleged fraudulent scheme to satisfy the statutory requirement that the mailings be "for the purpose of executing" the fraud (18 U.S.C. 1341). Petitioners characterize the scheme as one "to deprive Union Oil of confidential information" (Pet. 6)—a "theft-like taking" that reached fruition at "the moment of [the] unlawful appropriation" (Pet. 7).

Petitioners' argument proceeds from a narrow, incorrect characterization of the scheme charged in the indictment. The acquisition of the confidential geophysical data from Union Oil Company through Smith and Kent was only the initial step in the alleged scheme. The indictment also charged that it was part of the scheme that petitioners would obtain oil, gas, and mineral leases on the basis of the stolen

data through brokers hired for such purposes; that payments and royalty interests in the leases would be paid to Kent as compensation for obtaining the data; and that petitioners would endeavor to sell an interest in the leases to Union Oil Company, thereby recovering the costs incurred, while retaining an interest in future royalties and production (Pet. App. 1a-5a). The alleged scheme constituted far more than a "theft-like taking," for the fruits of the unlawful acquisition "would have been virtually worthless * * * had there been no prearrangement for their purchase and use." *Abbott* v. *United States*, 239 F.2d 310, 314 (5th Cir. 1956). Thus, the "[u]se of the purloined data was part and parcel of the scheme alleged" (Pet. App. 29a).[2]

Not until Patrick Petroleum obtained the leases in Mississippi and sold an interest in them to Union Oil Company did the fraudulent scheme come to fruition. Consequently, the use of the mails to receive state-

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[2] Petitioners err in relying on *United States* v. *Maze*, 414 U.S. 395 (1974), and *Kann* v. *United States*, 323 U.S. 88 (1944), for the proposition that a "theft-type" scheme cannot be considered a continuing offense that triggers the provisions of the mail fraud statute (Pet. 7). Virtually every scheme to defraud may be described as theft-like, in that the acquisition of money or property is the object of the scheme. See 18 U.S.C. 1341. This Court's decisions in *Maze* and *Kann* turned not on whether the scheme was theft-like but on whether the mailings had occurred after the scheme had reached fruition and hence could not have been for the purpose of executing the scheme. In the present case, all of the mailings charged in the indictment occurred before the scheme reached fruition.

ments from lease brokers (counts 1, 2, 3, 4 and 11), to send and receive information concerning the leasing activity (counts 5, 7, 9 and 12), to receive information concerning brokers' commissions and assignments of royalty interests in the leases (counts 6, 8, 10 and 13), and to transmit offers to sell an interest in the leases to Union Oil Company (counts 14, 15 and 16) were all "for the purpose of executing the scheme, as the statute requires." *Kann* v. *United States*, 323 U.S. 88, 94 (1944). The mailings charged in counts 1 through 16 were links in the chain by which the scheme would be accomplished. See *United States* v. *Brown*, 540 F.2d 364, 376 (8th Cir. 1976).

It is immaterial whether, as petitioners maintain (Pet. 8), the mailings reflect nothing more than the usual business response of a petroleum company to information about potential sources of new oil. In *United States* v. *Lea*, No. 79-1940 (7th Cir. Feb. 19, 1980), a mail fraud indictment charged the manager of a supermarket's meat purchasing department with receiving kickbacks from a meat broker. In return for the kickbacks, the manager purchased the broker's goods, enabling the broker to earn commissions from its clients. The court of appeals held that the mail fraud statute covered the broker's mailings of purchase confirmations and brokerage statements and its clients' mailings of commission checks. In so doing, the court characterized the mailings as "normal concomitants of the brokerage transactions and * * * therefore incident to an essential element of the scheme." The mailings thus satisfied the requirement

set forth in *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), that the mailings be "for the purpose of executing" the fraudulent scheme. *United States* v. *Lea*, *supra*, slip op. 7. In the present case, as in *Lea*, the brokers' statements and commissions facilitated the achievement of one of the objects of the scheme—to secure the leases in the Mississippi property. See also *United States* v. *Bright*, 588 F.2d 504 (5th Cir.), cert. denied, 440 U.S. 972 (1979).[3]

Petitioners incorrectly characterize the mailings in counts 14, 15 and 16 as being "designed to ensure detection of the fraudulent scheme" (Pet. 11). As charged in the indictment, these mailings were designed to promote the ultimate goal of the scheme: selling interests in the Mississippi leases to Union Oil Company, and thereby allowing petitioners to re-

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[3] *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977), does not support petitioners' suggestion that routine business mailings are all NOT covered by the mail fraud statute. *Tarnopol* involved an embezzlement scheme whereby officers and employees of a legitimate business enterprise diverted some routine shipping confirmations for their own use and profit. Because the shipping confirmations were sent in connection with all sales, whether or not they were involved in the scheme to defraud, the court held that these mailings were too remote from the scheme to be regarded as furthering it.

Tarnopol is readily distinguishable from this case. The mailings charged in the instant indictment were not routine business procedures; they constituted part of petitioners' use of the stolen data. The success of the scheme need not have depended on the mailings in a "but for" sense. *United States* v. *Buchanan*, 544 F.2d 1322, 1325 (5th Cir. 1977). It is sufficient that the mailings were "incident to an essential part of the scheme." *Pereira* v. *United States*, *supra*, 347 U.S. at 8. That test is satisfied here.

cover their costs while retaining an interest in the leases. Because the indictment sufficiently charges these mailings as being in furtherance of the scheme, these counts, like the others, were properly held not subject to dismissal at this early stage of the proceedings. See *United States* v. *Castor*, 558 F.2d 379, 384-385 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).[4]

In any event, this case does not present the broad question of what relationship between a fraudulent scheme and particular mailings must be alleged to trigger the mail fraud statute. The problem in this case was simply that "the district court misunderstood the scope of the alleged fraudulent scheme" (Pet. App. 29a). The court of appeals correctly found that the indictment was sufficient: it alleged all the elements of the offense of mail fraud, and the mailings, as alleged in the indictment, could be found to have been for the purpose of executing the scheme or attempting to do so (*ibid.*).[5]

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[4] *United States* v. *LaFerriere*, 546 F.2d 182 (5th Cir. 1977), relied on by petitioners (Pet. 11), is inapposite to petitioners' challenge to counts 14, 15 and 16. In *LaFerriere* a mailing by a victim of the fraud to the perpetrator, alerting the latter to the fact that the victim strongly suspected he had been defrauded and threatening to take remedial action, was held not to be in furtherance of the scheme. The mailings by petitioners to their alleged victim, as set forth in counts 14, 15 and 16 of the instant indictment, however, served the opposite purpose—bringing the fraudulent scheme to fruition.

[5] Petitioners erroneously rely (Pet. 9-10) on language from *Russell* v. *United States*, 369 U.S. 749, 764 (1962), in contending that a mail fraud indictment must do more than track the language of the statute. *Russell* was not a mail fraud case. It involved a prosecution under 2 U.S.C. 192 for failure to answer questions posed by a congressional committee. In that special context, the Court held, the defendant was entitled to be apprised of the nature of the offense in more detail than was provided by a mere recitation of the statutory language. Whatever the applicability of *Russell* beyond the narrow context of a contempt prosecution, the indictment in this case went far beyond mere recitation of the statutory language, and described the fraudulent scheme and the unlawful mailings in great detail.

In addition to dismissing the 16 substantive counts, the district court also dismissed the conspiracy count (count 17). The court of appeals properly reinstated that count as well. The basis for the offense of conspiracy to commit mail fraud is "an agreement to use the mails to defraud." *Pereira* v. *United States*, *supra*, 347 U.S. at 11. Count 17 should not have been dismissed, because petitioners could be found to have conspired in a fraudulent scheme using the documents and information mailed. See *United States* v. *Sampson*, 371 U.S. 75, 81 (1962); *United States* v. *Tilton*, 610 F.2d 302, 308 (5th Cir. 1980).[6]

[6] Petitioners also suggest that this case merits review because the indictment does not contain an express allegation of intent to defraud. Because the statute does not expressly mention intent, the indictment need not expressly charge specific intent. See *United States* v. *Behrman*, 258 U.S. 280, 288 (1922); *United States* v. *Lester*, 541 F.2d 499, 501 (5th Cir. 1976). In any event, the instant indictment actually did allege intent by charging that each mailing was done "knowingly" or "willfully."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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